IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

FAO(Ord.) No.228 of 2005.
Date of decision: 16.7.2007

Smt.Kaushalya & Others **….Appellants**

Versus

Sh.Ramesh Chand & Others **….Respondents**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Appellants: **Mr.Bhupender Gupta, Senior Advocate with Mr.Janesh Gupta, Advocate,**

For Respondents 1 to 4: **Mr. K.D. Sood, Advocate.**

For Respondents 35 & 36: **Mr.B.C. Negi, Advocate (Court Guardian).**

Dev Darshan Sud,J.

This is plaintiffs' appeal against the order of the learned Additional District Judge, Ghumarwin, by which Civil Suit No.178/1 of 1994 was remanded to the Court of the learned Civil Judge (Senior Division), Ghumarwin, for disposal afresh in accordance with law after determining the question of abatement and substitution of legal representatives or exemption etc.

The defendants-respondents were appellants before the learned Appellate Court against the judgment and decree which had been passed against them. During

---

[1] ***Whether the reporters of Local Papers may be allowed to see the judgement***?

the pendency of the appeal, an application was moved by the respondents (appellants before the learned Appellate Court) stating that the judgment and decree dated 9.7.2001 was a nullity as it had been passed against dead persons namely; Smt.Jiuni @ Shankru widow of Kirpu, who was died on 15.7.1998, defendant No.21, Mahantu, who was died on 2.1.1998 and defendant No.16 Soma Devi, who was also died when the matter was pending before the learned trial Court, but no steps had been taken to ensure their representation through their legal representatives or any order made to ascertain as to whether their estate was represented or not.

The plaintiffs, who were the respondents before the learned Appellate Court, opposed the application moved by the defendants-respondents alleging that Smt.Jiuni was not the legal representative of defendant No.1 Munshi Ram. She had neither appeared before the lower Court nor had filed any written statement to the suit etc. So far as respondents No.16 and 21, namely; Soma Devi and Mahantu, are concerned, it was contended that they had not appeared before the learned lower Court nor filed their written statements and therefore their presence before Appellate Court was not necessary.

An application under Order 22 Rule 4(4) of the Code of Civil Procedure was moved by the appellants herein praying for exemption from substituting the legal representatives of deceased Jiuni and some other points

were also raised in the petition. It was alleged that respondents No.4 to 16 in the appeal be substituted as her legal representatives.

The learned Appellate Court, on the submissions made by the parties, held that Munshi Ram, one of the defendants, had died on 4.10.1997 and an application under Order 22 Rule 4 was moved before the learned trial Court alleging that Smt.Jiuni was the only legal representative of the deceased being his real sister. This application was resisted on a number of grounds. However, by its order dated 3.5.1999, the learned trial Court substituted Smt.Jiuni as also the appellants before the learned District Judge as the legal representatives of deceased Munshi Ram. The learned Appellate Court notes that no summons had been issued to Smt.Jiuni despite the fact that she had been substituted as one of the legal representatives of Munshi Ram. Alternate submission, of-course as noticed, was that exemption under Order 22 Rule 4(4) be granted to the appellants herein.

I have heard learned counsel for the parties and have gone through the record.

I find it strange that respondents No.4 to 16 before the learned Appellate Court, were not parties in the main suit. From the record this Court has not been able to ascertain nor has it been pointed out by the learned counsel appearing for the parties as to how these respondents came to be impleaded in the appeal for

the first time. However, no determination is being made by this Court on the respective contentions which have been made by the parties. The learned District Judge, was not correct in remanding the entire matter to the learned trial Court for determination afresh by setting aside the entire judgment. The proper course was to have sent the matter to the trial Court to ascertain as to whether:-

a) the suit had abated as a whole because of the fact that Smt.Jiuni, Mahantu and Soma Devi had died;

b) there was any necessity for granting exemption from bringing on record their legal representatives;

c) the estate of the deceased was already represented or in law, they were entitled to be deleted from the array of respondents-defendants without in any manner effecting the decree.

This appeal is accordingly allowed. The judgment and order of the learned Appellate Court are modified to the extent that the appeal will be kept pending before the learned District Judge and will be decided on the findings which will be arrived at by the learned trial Court. Needless to add that:-

(i) Any party aggrieved by the findings to be given by the learned trial Court on the question of abatement will be entitled to

challenge the same in the present appeal before the learned District Judge.

(ii) The question regarding the abatement of the suit and the legality of the judgment and decree on the death of Smt.Jiuni, Mahantu and Soma Devi will be determined by the learned trial Court for which purpose, both the parties will be given an opportunity to present their respective cases.

(iii) All the applications for substitution of legal representatives or for exemption etc. shall be sent to the learned trial Court for determination, which will be decided by the trial Court after giving adequate opportunity to both the parties. The learned trial Court will proceed with the matter expeditiously and decide the same on or before ***31st March, 2008***. These findings will be placed before the learned District Judge, who will then proceed with the appeal in accordance with law.

(iv) The parties personally or through their counsel will be present before the learned trial Court i.e. Civil Judge (Senior Division), Ghumarwin on ***4.10.2007***, who will then proceed with the matter in ***Civil Suit No.173/1 of 1994,*** titled***: Smt.Judhia etc. vs. Munshi Ram (deceased) etc.***

(v) The records of the Civil Suit alongwith the applications, moved under Order 22 Rule 4 before the learned District Judge, will be sent to the Court of the learned Civil Judge (Senior Division), Ghumarwin on or before ***4.10.2007***.

This appeal is disposed of. There shall be no order as to costs.

July 16, 2007. **(Dev Darshan Sud)**
(aks) **Judge.**